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Colin Powell's Reflection: Status, Behavior, and Discrimination

David Chang

Proponents of civil rights for homosexuals long have sought to draw a parallel between race and sexual orientation. As race is a characteristic of birth and largely immutable, so sexual orientation has been proclaimed a characteristic of birth and largely immutable. Advocates on both sides seize the latest bits of scientific study that might support or undermine the idea that a person's sexual orientation is set at birth. The issue is important, because drawing connections—or denying connections—between racism and homophobia has been widely viewed as providing—or denying—the critical moral context in which discrimination because of sexual orientation can be deemed contrary to the nation's higher constitutional ideals.

Indeed, during the debate about lifting the ban on gays and lesbians in the military, a central question concerned the comparability between discrimination because of race and discrimination because of sexual orientation. A key figure in this debate was General Colin Powell. On the comparability of race and sexual orientation, Powell said,

Skin color is a benign, nonbehavioral characteristic. Sexual orientation is perhaps the most profound of behavioral characteristics. Comparison of the two is a convenient but invalid argument. As Chairman of the Joint Chiefs of Staff, as well as an African-American fully conversant with history, I believe the policy we have adopted is consistent with the necessary standards of order and discipline required of the armed forces.¹

Debates about the origin and immutability of sexual orientation—as well as focus on the choices made by homosexuals—miss the mark and preclude a

rigorous understanding of the relationship between discrimination because of race and discrimination because of sexual orientation. Discrimination because of sexual orientation is not so different from racial discrimination as opponents of gay rights would believe, nor is it so similar to racial discrimination as proponents of gay rights might believe.

There was a germ of truth in Powell's attempt to distinguish between race and sexual orientation. Race is, indeed, not a behavioral characteristic; physical gender, as well, is a nonbehavioral characteristic. Although not always about behavior, sexual orientation is at least defined by thoughts—thoughts that frequently are transformed through choices into action.² Perhaps recognizing this, some seek to draw a parallel between race and sexual orientation by arguing that homosexuality is innate and immutable. If people are born gay, as people are born black, the argument goes, then discrimination because of sexual orientation is as immoral as racial discrimination.

On closer analysis, however, whether people are born gay is beside the point. There are claims that all sorts of thoughts have innate roots. Opponents of rights for gay men and lesbians forcefully argue that rape, for example, is not less a social evil if a person has an innate inclination to rape because he was born with an XYY chromosome. Child molestation is no less a social blight if the molester's inclination was formed by genetics, childhood experience, or a combination. Furthermore, it is undeniably true that the decision to transform thoughts—whether innate or not—into action involves choice. This choice to act is the basis for many to distinguish discrimination against gays, who choose to act on their sexual orientation, from discrimination against blacks or women, who obviously make no choice in being black or female.

But here is where opponents of gay rights overstate their claim. Contrary to Powell's analysis, the issue is not simply how closely analogous are race or skin color and sexual orientation or behavior. Rather, the question concerns *discrimination* because of race and *discrimination* because of sexual orientation. Racial discrimination is frequently about choices, not simply the status of race. Once slavery ended, blacks were branded criminals not simply for being black, but for *choosing* to breach some social code of ritual manners signifying subordination.

For example, there was a time, not so long ago, when interracial marriage and sex were criminal in many states. Indeed, society's racism was particularly virulent in these contexts of marriage and sex. Under many miscegenation laws, blacks who married or had sex with whites were branded criminal. Some were lynched. This is not discrimination based on race alone—as slavery might be viewed as imprisonment at hard labor simply for being black. Rather, this was discrimination triggered by a *choice* deemed inappropriate for a black person. Despite the fact that blacks could insulate themselves from punishment by choosing not to breach social restrictions, this is a paradigm of what anyone would view as pure racial discrimination. A choice deemed appropriate for a white person—to marry a white person—is deemed inappropriate for a black

person. The essence of racial discrimination is the prohibition of *choice* for one race that another race is permitted to make.

So choice is involved, whether one chooses interracial marriage or chooses to rape. But society's prohibitions of these choices are distinguishable, because the prohibition of rape is a universal prohibition. Rape is a choice prohibited to all, by virtue of being human. In contrast, the miscegenation law's prohibition of marriage is partial. Only nonwhite people are prohibited from marrying white people. Only white people are prohibited from marrying nonwhite people. The prohibited choices are not universal, and the discrimination as to who makes the various choices is a function of race.

This discrimination because of race is morally significant because it violates principles of human equality fundamental in America's post-Civil War constitutional tradition. It violates the idea that every individual has an equal birthright to pursue society's opportunities—that it is wrong to look at a newborn baby and conclude that there are certain choices some people are permitted to make that this baby, when grown, should be prohibited from making, because of some physical characteristic with which this baby was born. In contrast, a universal prohibition—such as the criminalization of rape—defines a choice that no one may make. Denying a choice to everyone, unlike denying a choice because of racist judgments about race, does not violate the principle that every individual has an equal birthright to pursue society's opportunities.

Understanding the prohibition of interracial marriage as racial discrimination, even though interracial marriage is chosen, can help us better understand both the commonality and differences between discrimination because of race and discrimination because of sexual orientation. Consider the paradigmatic discrimination against lesbians and gay men. The discrimination against men marrying men, or having sex with men, and similar discrimination against women with women are structurally gender discrimination.³ The essence of gender discrimination is the prohibition of a *choice* for one gender that the other gender is permitted to make. This is parallel to the structural essence of racial discrimination—the prohibition of a *choice* by a person of one race that a person of another race is permitted to make. As a matter of logic, therefore, the prohibition of homosexual marriage or sex is as much gender discrimination as the prohibition of interracial marriage or sex is racial discrimination. This is so despite the fact that choice is involved. Indeed, this is so because the choice to marry or have sex that is allowed to some is denied to others *because of their gender*.

Although the prohibition of marriage and sex between people of the same gender is, indeed, pure gender discrimination, discrimination against gays in other contexts—for example, employment in the military—is a step removed from pure gender discrimination. The ban on lesbians in the military is not pure gender discrimination, because some women are permitted to choose a career in the military. Similarly, the military ban on gay men is not pure gender discrimination, as men who make one *choice* deemed inappropriate for their

gender—same-sex intimacy—are prohibited from making the further *choice* of serving in the military.⁴

Is it significant as a matter of social justice—and ultimately as a matter of constitutional law—that employment, housing, and other forms of discrimination against lesbians and gay men are not pure gender discrimination, but derived from gender discrimination? To address this question we must return to the context of race. The following analogy is a speculative modification of America's social experience, but might be essential for an understanding of the structural relationship between discrimination because of race and discrimination because of sexual orientation.

Suppose that society's mores against interracial sex and marriage were more lasting and more intense than they actually have been. Suppose that people sexually attracted to people of other races were perceived as a discrete class of person—a wholly different kind of person. *Their sexual orientation is deemed wrong for a person of their race.* They are called interracialsexuals.⁵ Where this sexual orientation comes from is a matter of debate. But interracialsexuals are targets of public scorn and discrimination. Not only are they prohibited from marrying and having sex, they are subject to employment discrimination, housing discrimination, and the full range of discrimination of which people who hate are capable.⁶

The prohibition of interracial marriage and sex involves pure racial discrimination, as previously discussed. But further discrimination against interracialsexuals—in employment and housing—is a step removed from pure racial discrimination. People who are black are not prohibited from choosing to be, say, teachers. Rather, black people *who choose to marry white people* are prohibited from choosing to be teachers.

Although such employment discrimination against interracialsexuals is not pure racial discrimination, but derived from pure racial discrimination in a particularly virulent context, Colin Powell, and others who are *fully committed to racial equality*, probably would not say that employment discrimination against blacks who choose to marry whites does not amount to immoral racial discrimination. For those fully committed to racial equality, it probably would not matter that race is nonbehavioral, while interracial sexuality is behavioral. Rather, the morality of this discrimination depends on the morality of the foundational discrimination, which is purely racial—the prohibition of interracial sexual liaisons.

Similarly, homosexuality, like interracialsexuality, might be behavioral, but gender, like race, is not. Although employment discrimination against homosexuals is not *pure* gender discrimination, but is derived from gender discrimination in a particularly virulent context, a society that is *fully committed to gender equality* would not say that discrimination against women who choose to have relationships with women does not amount to *immoral* gender discrimination. For people fully committed to gender equality, it would not matter that gender is nonbehavioral, while homosexuality is behavioral. Rather, the moral-

ity of discrimination against lesbians and gay men depends on the morality of the underlying discrimination, which is purely because of gender—the prohibition of homosexual liaisons.

What are the legal and political implications of the observations that (1) discrimination against gay men and lesbians in rights of marriage and sexual activity is *gender* discrimination in a particularly enduring and intense context; and (2) other forms of discrimination against lesbians and gay men are not gender discrimination *per se*, but are derived from this foundational gender discrimination?

First, *derivative* discrimination against gay men and lesbians—in employment, housing, and other contexts—perhaps cannot be squarely confronted until the definitional discrimination against homosexuals is first, understood as gender discrimination, and second, condemned as gender discrimination. Otherwise, opponents of gay rights will retain the forceful arguments that race (and, indeed, gender) is a matter of physical status, while homosexuality is a matter of thoughts (whether voluntary or not) and chosen actions. The moral principle that identifies *why* the state should not deny certain choices to certain people that it allows to others—the principle defining the immorality of discrimination because of gender—remains hidden. The basis for distinguishing homosexual liaisons from rape or child molestation remains hidden. The moral common ground linking the ideas that racism is wrong, sexism is wrong, and heterosexism is wrong remains obscured.

Second, because discrimination against homosexuals in the contexts of marriage and sexual activity truly is a matter of gender discrimination, *political* considerations of its propriety will be informed by society's feelings about gender discrimination and gender roles. However committed to racial equality our political culture claims to be, its understanding of and commitment to principles of gender equality is more tenuous. The Equal Rights Amendment was not ratified. The nation's ideological conscience has not yet grasped the moral parallel between racial discrimination and gender discrimination—that both racist discrimination and sexist discrimination violate the principle that each individual has an equal birthright to pursue society's opportunities.⁷

Thus one's expectations from America's legal/political community must be limited because of its ambivalent commitment to gender equality. Because discrimination against homosexuals is gender discrimination in such an intense and enduring context, widespread (i.e., national) changes in law and society will require protracted political struggle, debate, and education. Gay rights advocates must strongly articulate the principle that equal opportunity for all humans must not be restricted by prescriptions that some people should not pursue goals of which they are fully capable because of the body with which they were born—when others are permitted to pursue those goals because of the body with which they were born.

No wonder, then, that advocates of rights for gay men and lesbians have had so much difficulty persuading opponents that traditional condemnations of

homosexuality as immoral are themselves immoral. The fundamental point, it seems to me, is that people will not understand why homophobia is immoral until they understand why sexism is immoral. And they will not understand why sexism is immoral until they understand not simply that racism is immoral, but *why* racism is immoral.

Lazy thinking can lead one to right conclusions as well as to wrong. Our first task is to ensure that social truths that have been achieved through years of struggle become not thoughtless platitudes, but the product of moral understanding capable of growth. It is not enough to know that racism is wrong. The important point is to know *why*.

Notes

1. Scott Tucker, Panic in the Pentagon, *Humanist* 53 (May-June 1993): 41-45 (quoting Powell letter to Rep. Pat Schroeder). Powell also said, "The presence of homosexuals in the force would be detrimental to good order and discipline, for a variety of reasons, principally relating around the issue of privacy. I think it would be very, very difficult to accommodate [homosexuality] into the armed forces." Transcript of Question and Answer Session at U.S. Naval Academy, Jan. 11, 1993.

2. Cf. Andrew Sullivan, The Politics of Homosexuality: A New Case for a New Beginning, *New Republic* 208, no. 19 (May 10, 1993): 24. Sullivan stated, "Race is in no way behavioral; sexuality, though distinct from sexual activity, is profoundly linked to a settled pattern of behavior" (31).

3. See, e.g., David Chang, Conflict, Coherence, and Constitutional Intent, 72 *Iowa L. Rev.* 825-28 (1987); Sylvia A. Law, Homosexuality and the Social Meaning of Gender, 1988 *Wis. L. Rev.* 187, 230-32 ("History suggests that a primary purpose and effect of state enforcement of heterosexuality is to preserve gender differentiation and the relationships premised upon it. Thus, constitutional restraints against gender discrimination must also be applied to laws censuring homosexuality. . . . Wholly apart from the question of whether homosexuality is a constitutionally suspect classification, laws barring marriage of two people of the same sex discriminate on the basis of gender."). Rex Lee, A Lawyer Looks at the Equal Rights Amendment 65 (1980).

4. It is perhaps more accurate to say that under the "don't ask, don't tell" policy, men who make the choice to reveal their sexual orientation are prohibited from making the further choice of serving in the military.

5. Cf. Samuel Marcossen, Harassment on the Basis of Sexual Orientation: A Claim of Sexual Discrimination under Title VII, 81 *Geo L. Rev.* 1, 6 (1992) (arguing that a "state law which criminalizes an individual's 'preference' for sexual relations with persons of a race other than her own—we may call such persons 'miscegenosexuals'—would fall on equal protection grounds as readily as did the law banning interracial marriages.").

6. A social construct of interracialsexuality and its condemnation is not so far removed from historical reality as might at first appear. Fear of interracial sexual liaison has been declared "the principle around which the whole structure of segregation of the Negroes—down to disenfranchisement and denial of equal opportunities on the labor market—is organized. . . . Every single measure is defended as necessary to block 'social equality' which in turn is necessary to prevent 'intermarriage.'" Gunnar Myrdal, *An American Dilemma* 587 (1944).

7. Furthermore, many might reject the notion that discrimination against homosexuals in contexts of marriage and sexual liberty is, in fact, discrimination because of gender. The American polity has a history of similar lapses in rationality in understanding the prohibition of interracial marriages as racial discrimination. When roles are so deeply entrenched that they seem part of nature's order or God's Will, whether those roles were of racial homogeneity or sexual heterogeneity, many fail to see that discrimination based on race or gender is, indeed, *because of* race or gender.